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IN THE

SUPREME COURT OF THE UNITED STATES

MRS. VERA ROBERTS,
Petitioner,

vs.

THE MEMPHIS STREET RAILWAY COMPANY,
Respondent.

No. 86 MISC.

ANSWER AND BRIEF OF RESPONDENT, THE MEMPHIS STREET RAILWAY COMPANY, TO PETITION FOR A WRIT OF CERTIORARI.

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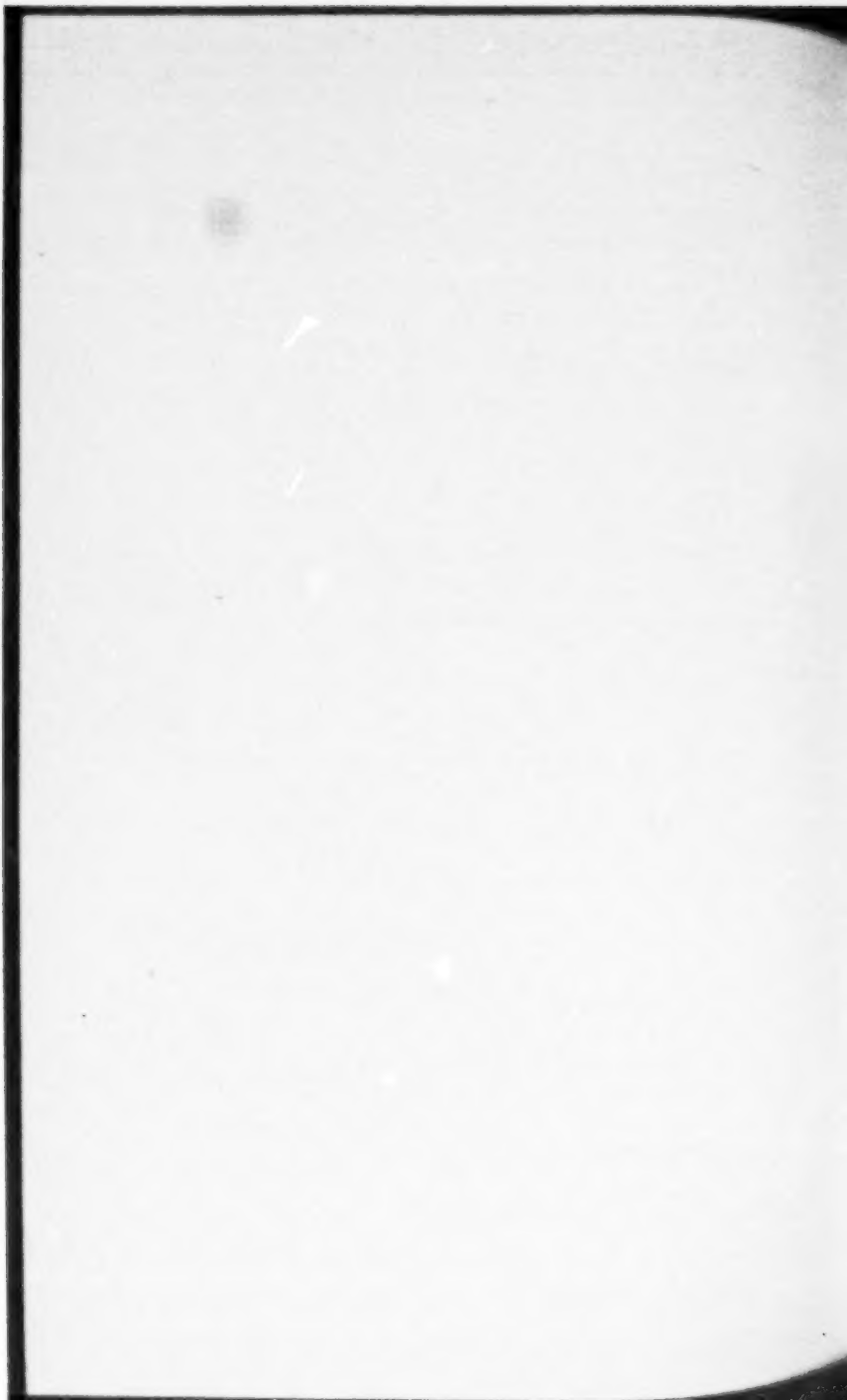

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MRS. VERA ROBERTS,
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No. 86 MISC.

ANSWER AND BRIEF OF RESPONDENT, THE MEMPHIS STREET RAILWAY COMPANY, TO PETITION FOR A WRIT OF CERTIORARI.

RESPONDENT, THE MEMPHIS STREET RAILWAY COMPANY, RESPECTFULLY SUBMITS THAT THE PETITION FOR A WRIT OF CERTIORARI IN THIS CAUSE BY MRS. VERA ROBERTS, PETITIONER, IS WITHOUT MERIT AND SHOULD BE DENIED FOR THE FOLLOWING REASONS:

I.

The petition for certiorari requests that this Honorable Court review an order of the United States Court of Appeals for the Sixth Circuit, wherein they affirmed

the Honorable Trial Court, the District Court of the United States for the Western Division of the Western District of Tennessee, in his discretionary ruling denying petitioner an appeal in this cause in forma pauperis. The District Court ruled as follows: (Tr. page 23, Supp. Tr. pp. 13, 23, Infra Brief p. 2).

1. Plaintiff's law suit was frivolous and without merit.
2. Substantial justice has been done.
3. This appeal is without merit.
4. There is no substantial question involved in the appeal.
5. The Court finds that the plaintiff is able to make bond.
6. The Court finds that plaintiff's attorneys are able to make bond and they are employed on a contingent fee basis.

The full order of the District Judge is as follows: (Tr. p. 23, Supp. Tr. pp. 13, 23).

ORDER DENYING PETITION TO APPEAL IN FORMA PAUPERIS.

"This cause came on to be heard on January 27, 1948, upon the petition of plaintiff, Mrs. Vera Roberts, for leave to appeal in forma pauperis, a copy of her affidavit in lieu of appeal bond being attached thereto as Exhibit A;

"And it appearing to the Court that the contract existing between plaintiff and her attorneys is contingent upon her recovery against defendant and that they have not filed a pauper's oath.

"The Court finds in his opinion the plaintiff's lawsuit was frivolous and without merit, substantial justice has been done, that this appeal is without merit, and there is no substantial question involved in same. The Court further finds that the plaintiff

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is able to make bond and so are her attorneys, who are employed on a contingent fee basis.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that the petition of plaintiff, Mrs. Vera Roberts, for leave to appeal in forma pauperis be, and the same is hereby denied.

"To which ruling of the Court the plaintiff excepts."

/s/ MARION S. BOYD,
United States District Judge.
(1/27/48.)

II.

The certiorari asks that this Honorable Court review an order of the United States Court of Appeals for the Sixth Circuit based on a Rule of that Court governing printing of records and briefs in that Court. (Rules 10 and 18, Rules of the United States Court of Appeals for the Sixth Circuit, and Rules of Civil Procedure adopted by that Court, Rule 75 (l) and (m).

III.

This certiorari assumes and proceeds as if appeals from the District Court in forma pauperis are matters of right, not matters of discretion allowed only on order of the Trial Court.

IV.

Petitioner has shown no merit, either in her suit or appeal or in her request for permission to appeal in forma pauperis, as the Honorable Trial Court found.

V.

This cause presents no question on which there is a conflict of decision, for the District Court based his dis-

cretionary ruling refusing a request to appeal in forma pauperis on six distinct controlling grounds, affirmed twice by the United States Court of Appeals for the Sixth Circuit, (Tr. pages 36, 65) also supra, United States Supreme Court, Rule 38 (5) and (5-b).

VI.

The question raised by this certiorari regarding rule of Sixth Circuit requiring contingent fee attorneys to also take pauper's oath is not a determinative question in this cause and could be eliminated from consideration entirely without changing the result. It was not the reason for the decisions of the Honorable Trial Court or of the Honorable Court of Appeals, but only the last of six good reasons in support of same.

ANSWER.

The order in the District Court was entered after written motion by plaintiff for leave to appeal in forma pauperis had been filed and presented January 27, 1948. (Tr. page 23, Supp. Tr. pp. 13, 23), (Full order quoted supra, page 2 Brief).

This was the second request to the District Court on this question. The first one so clearly reflects the District Judge's opinion of this case and his exercise of discretion in denying the motion that we quote herewith from same. (Supplemental Original Transcript, pages 723 through 730 of the full record which we were compelled to add to the Record as a supplement in the United States Court of Appeals for the Sixth Circuit and which we had to again add to his record. Supp. Tr. pp. 4 through 11. A reading of same clearly demonstrates why this petitioner has tried diligently to have it left out of both appellate records.)

Pertinent parts are as follows:

"Supp. Tr. pp. 7-9.:

"THE COURT: Well, I don't want to pre-judge the matter, but it has been pretty well settled by our Court of Appeals in an appeal from this court many years ago in a proceeding against Judge Ross wherein it was sought to prosecute a case on the pauper's oath, and counsel was interested directly on the contingent fee basis, that not only the party but plaintiff's counsel was also required to take the prescribed oath. I just say here now I will hear you on it at some later date, but in the Court's opinion bond will have to be given on an appeal in the case. Of course the Court could be in error—and has been a good many times—but as an additional reason, there was absolutely no merit in the case—

"MRS. ASPERO: Which case, Your Honor?

"THE COURT: Talking about the Memphis Street Railway case, as I understand it. It was evident from the very beginning, after the plaintiff testified in that case, that the plaintiff had no lawsuit. I just say that very frankly. She certainly is not entitled, in my opinion, to appeal that case on the pauper's oath, and I don't think it would be proper at all for the Court to say at this time all of that long record should be transcribed and taxed as costs. As I understand it from your reading of the rules, it is discretionary with the Court—

"MRS. ASPERO: That is correct, Your Honor.

"THE COURT: The Court will certainly not exercise its discretion in an appeal of that case, which had no merit at all. The Court, as I say, would not look favorably on an application, any application to appeal that case on the pauper's oath, and have that long record transcribed by the reporter, so I think we will just treat this as an informal application at this time, and you may prepare whatever is necessary to prepare to bring it to the Court's attention and protect your client's rights.

"MRS. ASPERO: Yes, Your Honor.

"THE COURT: And it is a very plain matter as I see it. It would be a loss of time to argue about it at a later date, and just consider it as passed on at this time and the application denied.

"MRS. ASPERO: Would Your Honor let us present authorities to the effect that an attorney to go as surety on a cost bond, the attorney paying the costs, as a champertous agreement?

"THE COURT: As I see it, aside from that question, this plaintiff is not entitled to appeal on the pauper's oath, because there is no merit in the case. It has been a frivolous lawsuit, and there could be no substantial question on appeal. And the additional reason that the plaintiff, in the Court's opinion, from what the Court heard during a three day trial, could make a cost bond if she tried. - - - - "

Petitioner, her counsel in the lower Court, in the Court of Appeals and now her counsel here all overlook and disregard the fact that an appeal in forma pauperis is not a matter of right, but one of discretion. In attempting to present their appeal in the United States Court of Appeals for the Sixth Circuit, petitioner proceeded in the matter as if the District Court had allowed their request for appeal in forma pauperis, not disallowed and refused same two different times. (Tr. p. 23, Supp. Tr. pp. 4 to 11, inc. 13, 23.)

The Honorable Trial Court heard the testimony, saw the petitioner and her witnesses and labeled this lawsuit:

"A very queer lawsuit."
(Orig. Tr. page 349.)
"Frivolous and without merit."
(Orig. Tr. page 713.)

(Orig. Supp. Tr. pages 727, 728) Tr. p. 23 Supp. pp. 13 and 23.

And the Court further held that:

"Substantial justice has been done."
(Orig. Tr. page 713) Tr. p. 23, Supp. Tr. p. 13.
"There is no substantial question involved in this appeal."
(Orig. Tr. page 713.)
(Orig. Supp. Tr. page 728) Tr. p. 23, Supp. Tr. p. 13.
"Appellant and her counsel could make bond if they had tried."
(Orig. Tr. page 713.)
(Orig. Supp. Tr. Page 728) Tr. p. 23, Supp. Tr. p. 13.

The identical motion to proceed in forma pauperis has now been filed and denied in the Trial Court twice, Tr. page 23 and Supp. Tr. pp. 4 to 11, 13 and 23, also in the United States Court of Appeals for the Sixth Circuit twice, Tr. page 36 and page 65, and now is filed in this Honorable Court.

We respectfully submit that petitioner's swearing to a claimed fact, as done in the trial which was decided against her by the Judge and Jury, and her affidavit in forma pauperis filed in three Courts, does not make the facts alleged therein true.

For instance, appellant's motion in the United States Court of Appeals for the Sixth Circuit states her claimed reason for the Trial Judge disallowing the pauper's oath appeal as being unwillingness of counsel to also take pauper's oath. That is not so, as the Trial Judge twice set forth clearly and convincingly six separate reasons

for disallowing the appeal in forma pauperis, any one of them being legally sufficient. (Tr. page 23, Supp. Tr. pp. 13, 23 and p. 2 Brief.)

Again petitioner in the petition for certiorari herein, page 2, asserts the same reason for the Trial Court rule, then quotes only two of four paragraphs of said order. This is clearly an attempt to mislead this Honorable Court by omitting the last two paragraphs of the order, which contain the actual finding of the Honorable Trial Court and his reasons. (Tr. page 23, Supp. Tr. pp. 13, 23 and page 2 Brief.)

Again on page 5 of the petition for certiorari the same misleading statements are made and the same reason given for the ruling in the Honorable United States Court of Appeals. An examination of the orders of that Court do not support this claim. (Tr. page 36 and Tr. p. 65.)

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BRIEF.

I.

THE GROUNDS UPON WHICH THIS PETITION FOR A WRIT OF CERTIORARI IS BASED ARE NOT THE GROUNDS UPON WHICH THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENIED PETITIONER'S APPLICATION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

The right of appeal in forma pauperis is a privilege based on statute and lies in the discretion of the Trial Court.

> *Millslagle v. Olsen* (1942 *C. C. A.* 8th) 130 Fed. (2d) 212.

The basis for appeals in forma pauperis is found in 28 U. S. Code Annotated, Section 832:

> "Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or

to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action or appeal. - - - - (July 20, 1892, c. 209, S. 1, 27 Stat. 252; June 25, 1910, c. 435, 36 Stat. 866; June 27, 1922, c. 246, 42 Stat. 666; Jan. 31, 1928, c. 14, S. 1, 45 Stat. 54.)"

It is to be allowed on appropriate showing by order of the Trial Court, who saw the parties and heard the witnesses, and who can thus determine whether there are grounds for further review of the cause, or whether the appeal is frivolous, vexatious and without merit.

Dorsey v. Gill (1945 *App. D. C.*) 148 Fed. (2d) 857, cert. denied; 325 U. S. 890; 65 S. Ct. 1580; 89 L. Ed. 2003.

Kinney v. Plymouth Rock Squab Co. (1915) 236 U. S. 43; 35 S. Ct. 236; 59 L. Ed. 457.

Any one of the findings of the Trial Court that:

1. Plaintiff's law suit was frivolous and without merit,
2. Substantial justice has been done,
3. This appeal is without merit,
4. There is no substantial question involved in the appeal,
5. Plaintiff is able to make bond,
6. Plaintiff's attorneys are able to make bond and they are employed on a contingent fee basis,

is sufficient to support the appellate court's denial of the plaintiff-petitioner's application for leave to file an appeal in forma pauperis.

Wells v. United States (1943) 318 U. S. 257; 63 S. Ct. 582; 87 L. Ed. 747.

McMillan v. Taylor (1946 *App. D. C.*) 160 Fed. (2d) 217; 81 U. S. App. D. C. 249.
Redmon v. Squier (1947 *C. C. A. 9th*) 162 Fed. (2d) 195.

These findings of the Trial Court, affirmed by the United States Court of Appeals for the Sixth Circuit, will not be reviewed on the one point regarding the rule of the Court of Appeals for the Sixth Circuit that contingent contract attorneys applying for leave to appeal in forma pauperis are also required to take the pauper's oath with their client or else to post bond, when any one of the findings of the Trial Court standing alone is sufficient to support the denial of the petition to proceed on appeal in forma pauperis.

In re Snow (1945 *C. C. A. 9th*) 147 Fed. (2d) 1006; cert. denied. 325 U. S. 836, 65 S. Ct. 1187, 89 L. Ed. 1963; rehearing denied, 325 U. S. 895, 65 S. Ct. 1559, 89 L. Ed. 2006.
O'Brien's Manual of Federal Appellate Procedure, 3rd Cu. Supp., p. 78.

Rule 61 of the Federal Rules of Civil Procedure prescribes for the United States District Courts a standard by which they are guided:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

And this rule is also to be heeded by appellate courts as a guide in the determination of whether to grant or to deny an appeal.

> *University City, Mo. v. Home Fire & Marine Ins. Co.*, (1940 C. C. A. 8th); 114 Fed. (2d) 288.

This petition for a writ of certiorari fails to state any special or important or competent reason in its behalf.

II.

THE RULE OF COURT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, WHICH PETITIONER CLAIMS WAS THE BASIS FOR THAT COURT'S DENIAL OF HIS APPLICATION TO APPEAL IN FORMA PAUPERIS, IS A VALID RULE.

The United States Court of Appeals for the Sixth Circuit has the right and authority to prescribe its own rules of procedure.

> "Each Circuit Court of Appeals shall prescribe - - - - and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. (March 3, 1891, c. 517, S. 2, 26 Stat. 826; March 3, 1911, c. 231, S. 122, 36 Stat. 1132.)" 28 *U. S. C. A., Sec.* 219.

Further, the rule of the United States Court of Appeals for the Sixth Circuit requiring a contingent contract at-

torney to also take the pauper's oath with his client or to give bond, which reads as follows:

> "2. If appellant was plaintiff or complainant below, he must, with his application to this court, make it appear whether or not any other person—attorney, counsel, or otherwise—is beneficially interested in the recovery sought, and, if so, that every such person is, because of his poverty, unable to pay, or give security for, the costs from which appellant seeks to be excused." *Rule* 18, *paragraph* 2, *Rules of Court of the United States Court of Appeals for the Sixth Circuit.*

has been upheld.

> *United States v. Ross* (1924 *C. C. A. 6th*) 298 Fed. 64; 33 A. L. R. 728;
> *Phillips v. Louisville, etc. R. R. Co.* (1907 *C. C. Ala.*) 153 Fed. 795.

This rule has also been adopted as a rule of court by the United States Court of Appeals for the Third Circuit:

> Applications by citizens of the United States and by seamen for leave to proceed in this Court without prepaying fees or costs or giving security therefor shall be by verified petition setting forth the facts entitling the petitioner to proceed in forma pauperis under the statutes (28 U. S. C., Sections 832, 837). If the petitioner was the plaintiff below, he shall set forth in his petition whether any other person, attorney or otherwise, is beneficially interested in the recovery sought, and, if so, whether every such person is, because of his poverty, unable to pay, or give security for, the fees and costs from which the petitioner seeks to be excused." *Rule 28 of U. S. C. A. for Third Circuit.*

and has been given a construction in that Circuit similar to the construction given the rule in the Sixth Circuit.

The case of

Quittner v. Motion Picture Producers & Distributors (1934 C. C. A. 2nd); 70 Fed. (2d) 331.

cited on page 16 of plaintiff's typewritten Petition for Writ of Certiorari as authority for their proposition, is distinguishable on its facts. The Second Circuit had no such rule of court as the Sixth Circuit, requiring a contingent contract attorney to take the pauper's oath before being allowed to prosecute an appeal for a client in forma pauperis. The Court further specifically found in that case (at page 331, column 2):

> "It appears in his statement of facts and in the opinion rendered by the Court below and counsel's certificate that the appeal is taken in good faith with reasonable expectation of success."

From a reading of the opinion of the Trial Court in our case it is apparent that this appeal is not taken in good faith and that there is no reasonable expectation of success.

The other cases cited in petitioner's brief either relate to the question of whether a suit may be instituted in a trial court in forma pauperis without requiring the attorney to take the pauper's oath (as per *Clark v. United States* [1932 D. C. W. D. Mo.] 57 Fed. [2d] 214, cited page 14 of petitioner's typewritten Petition for Writ of Certiorari; and as per *Jacobs v. No. Louisiana & Gulf R. R. Co., et al* [1946 D. C. W. D. La.] 69 Fed. Supp. 5, cited page 17 of petitioner's typewritten Petition), or base their holding upon the ground that such a requirement is champertous. Petitioner here has already had his day in court and his attorney was not required to file a pauper's

oath in order to prosecute his suit, which resulted in a jury verdict and judgment for the respondent. The requirement in our case only comes into play when the plaintiff seeks leave to appeal in forma pauperis. The requirement that his contingent contract attorney also file the oath or else post bond is for the obvious purpose of preventing harassing and unmeritorious appeals, which are designed only to force respondent to effect a compromise.

In the case of *Quittner v. Motion Picture Producers & Distributors, supra,* Judge Learned Hand vigorously dissented from the majority holding, pointing out that there is no champertous agreement unless before the institution of suit the attorney agrees to pay the costs. Judge Hand concludes his dissent (page 332, column 2) by saying:

> "I can see no reason for refusing to follow the uniform rule in other Circuit Courts of Appeal, or why a lawyer who has made himself in effect a part owner of the cause of action, should enjoy immunity which other persons in the same case do not have."

Petitioner's history, in her brief, pages 9 to 21, presents matter which has not been considered previously in this cause, which are not facts in the record, and which has nothing to do with the merits of our case. It is an attempt to inject into this record a question not decisive of the case and not the reason for the Honorable Trial Court's ruling, nor the reason for the ruling of the Honorable Court of Appeals for the Sixth Circuit.

The references at pages 18 and 19 of petitioner's typewritten PETITION FOR WRIT OF CERTIORARI to the

policy of the United States Court of Appeals for the Sixth Circuit of requiring printed records and briefs has no bearing on or application to this case, since the United States Court of Appeals for the Sixth Circuit does hear appeals in forma pauperis on typewritten records.

Rule 10, paragraph 1, of the Court of Appeals for the Sixth Circuit specifically adopts the Federal Rules of Civil Procedure, Nos. 73, 74, 75 and 76. Rule 10, paragraph 1, reads as follows:

> "1. Federal Rules of Civil Procedure, adopted by the Supreme Court pursuant to Act of June 19, 1934, Nos. 73, 74, 75 and 76, are adopted as rules of this court in cases to which they may apply."

Rule 75(m) of the Federal Rules of Civil Procedure, adopted by the Court of Appeals for the Sixth Circuit as one of its rules of court, gives the United States District Courts the power to prescribe other than printing as a method of preserving the record, after leave to appeal has been granted. Rule 75(m), however, is not invoked or applicable to our case, since the District Court specifically denied petitioner leave to appeal in forma pauperis and based its ruling on the six stated grounds quoted on page 2 of our Answer and Brief. (Order Tr. p. 23, Supp. Tr. pp. 13, 23).

In the face of these specific rulings there is no basis for petitioner's assumption that the United States Court of Appeals for the Sixth Circuit would not hear an appeal in forma pauperis on typewritten records and briefs.

III.

CONCLUSION.

Your respondent, therefore, respectfully prays that Mrs. Vera Roberts' PETITION FOR A WRIT OF CERTIORARI be denied.

Respectfully submitted,

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WARING, WALKER,
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Of Counsel,
September 7th, 1948.

ACKNOWLEDGMENT OF SERVICE

Service of the above Answer and Brief of Respondent to Petition for a Writ of Certiorari acknowledged and three copies of same received on this the 7th day of September, 1948.

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Memphis, Tennessee.

(By R)

No. 86, Misc. ROBERTS *v.* MEMPHIS STREET RAILWAY Co. On petition for writ of certiorari to the United

States Court of Appeals for the Sixth Circuit. *Per Curiam:* Petition for writ of certiorari granted. The order of the Court of Appeals is vacated and the case is remanded to that court for further consideration in the light of the opinion of this Court in *Adkins* v. *DuPont de Nemours & Co., ante,* p. 331. *Grover N. McCormick* for petitioner. *Roane Waring* and *Sam P. Walker* for respondent.

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